Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1995

PERCY A. GREGORY, JR.

Petitioner,

v.

ANN E. NEYDON (P24670)
PATRICIA FABRIZIO (P46946),

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Percy A. Gregory, Jr.
PRO-SE
603 Kingset
Rochester Hills, MI 48309
(810) 853-4007

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789

QUESTIONS PRESENTED

I. Did the District Court and the Court of Appeals err in not allowing me a Jury Trial according to Art. VI and Art. VII of the U.S. Constitution, the Supreme Law of the Land?

II. Did the Court of Appeals err in not allowing my rights, according to the U.S. Constitution, as related in my Brief, according to Law?

III. Did the Court of Appeals err because Administrative issue of "Liability" procedure was not followed according to Law?

IV. Did the Court of Appeals err on the "Transcript" from the District Court, based on "Notice" of Levy, not followed, according to Law?

V. Did the Court of Appeals err on my Forms W-4P, O.M.B. #1545-0415 because they were not followed according to Law?

VI. Did the Court of Appeals err because my rights, according to the "Privacy Act and Paperwork Reduction Act Notice #609 by the Privacy Act Law of 1974 (5 USC 552a, P.L.93-574), were not followed according to Law?

VII. Did the Court of Appeals err because my rights, according to "Title 26, U.S.C. Statutes", as related in my Brief, were violated according to Law?

VIII. Did the Court of Appeals err because my rights, according to the Court Cases, as related in my Brief, were violated according to Law?

PUBLISHER'S NOTE

ORIGINAL PAGINAT

PARTIES TO PROCEEDINGS

The parties to the proceedings are the Petitioner and the Respondents.

The Petitioner represented himself Pro-Se.

The Respondent, Electrical Workers Local 58 Pension Fund, is represented by Ann E. Neydon (P24670) and Patricia Fabrizio (P46946), 1000 Farmer, Detroit, Michigan 48226.

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OPINIONS BELOW

The Order of the Sixth Circuit sought to be reviewed is Percy A. Gregory, Jr. v. Ann E. Neydon (P24670) and Patricia Fabrizio (P46946), representing Electrical Workers Local 58 Pension Fund, No. 94-1858 (6th Cir. Nov. 14, 1994). The District Court Opinion of the same name is reported at 93-74453 (D. Mi. 1994). This Order and Opinion are reprinted in the accompanying Appendix.

JURISDICTION

The Order of the Court of Appeals in this case was filed on April 20, 1995. Petitioners' timely petition for rehearing was denied on June 14, 1995. The Jurisdiction of this Court is invoked under 28 USC Sect. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUES AND OTHER AUTHORITIES

This case concerns the U.S. Constitution, 26 USC Statutes and Other Authorities which are reprinted in the Table of Authorities.

STATEMENT OF THE CASE

A. Intrtoduction

Percy A. Gregory, Jr., the Petitioner in this action is a Sovereign Citizen of the United States and Legally adheres to the Supreme Law of the Land.

Petitioner filed application for "Disability" Pension Benefits on January 13, 1993.

Petitioner filed Forms W-4P, O.M.B. # 1545-0415, Withholding Certificate for Pension and Annuity payments, with the election box marked, "I elect not to have income tax withheld frrom my Pension or Annuity". (Do not complete lines 2 or 3). These W-4P Forms were signed by me pursuant to Title 26, USC Sect's. 3401(e) and 3402(f).

Petitioner then submitted to the Pension and Annuity Funds an "Affidavit Letter", dated July 28, 1993, pursuant to Title 26, USC Sect. 3402(n); which designates specifically: "Employees Incurring no Income Tax Liability".

The Pension Fund's Trustees, on July 21, 1993, approved Petitioner's application for "Disability Retirement" benefits, retroactive to February 1, 1993.

The "Notice" of Levy, stipulated to throughout the Respondent's Brief and manipulated to by "Levy", throughout Respondent's Brief, now comes in Conflict.

Petitioner did refuse to sign Part 3 of the "Notice" of Levy Form, "Under Penalties of Perjury" because I cannot find a Law, # of Law, or Sect. of Law that can force me to sign a Document, "Under Penalties of Perjury", thereby, giving up my Jurisdictional rights in a Court of Law.

As we will see in the Argument that "Liability" for a tax has to be prooven beyond a reasonable doubt prior to "Levying" anybody.

ARGUMENT

I. THE LOWER COURTS DECISIONS ARE IN CONFLICT WITH TITLE 26, U.S.C. CODE LAW.

GREGORY'S FORM W-4P WITHHOLDING CERTIFICATE FOR PENSION AND ANNUITY PAYMENTS, O.M.B.#1545-0415, PURSUANT TO TITLE 26, U.S.C. SECTIONS 3401(e) and 3402(f)(2)(a), ARE IN CONFLICT ACCORDING TO LAW.
It is clearly written on the W-4P Withholding Certificate Box, that, I have the "Election not to have Income Tax withheld from Pension and Annuity."

GREGORY SUBMITTED AN "AFFIDAVIT LETTER", DATED 7-28-93, PURSUANT TO TITLE 26, U.S.C. SECTION 3402(n), OF WHICH IS DEFINITELY IN CONFLICT.
It was related at District Court Level that: "Section 3402(n) governs the relationship between an Employer and IRS". The Conflict here is: "Section 3402(n), if read properly, governs the relationship between an Employer and Employee".

GREGORY'S RIGHTS PURSUANT TO TITLE 26, U.S. C. SECTIONS 3405(a)(2), 3405(b)(2a), 3405 (c), 3405(c)(1)(b) ARE IN CONFLICT.
As we can clearly see, these sections of Title 26, U.S.C. allow the Legal Right to "Elect to have no withholding from Pension and Annuity Funds". Any variation would constitute a DIRECT TAX which is illegal according to Article I, Sect. 9, Cl.4 of our United States Constitution, which States: "No Capitation or other DIRECT TAX shall be laid unless in proportion to the Census or Enumeration hereinbefore directed to be taken". Also, we, have a Conflict with "VOLUNTARY" withholding provisions v. "MANDATORY" withholding.
The United States Supreme Court Case stated: "Our system of taxation is based on "VOLUNTARY" ASSESSMENT and payment, not on "DISTRAINT". See:
Flora v. U.S., 362, 145, Pg. 176.
Privacy Act and Paperwork Reduction Act Notice, #609, by the Privacy Act Law of 1974 (5USC, 552a, P.L. 93-574)".
Art. I, Sect. 2, Cl. 3, (Apportionment Procedures)";
Art. I, Sect. 8, Cl. 1, (Uniformity Procedures)";

Art. XIII, (Involuntary Servitude and Slavery Procedures), of our United States Constitution.

GREGORY'S RIGHTS PURSUANT TO TITLE 26, USC SECTION 6331, ARE IN CONFLICT.
As we can clearly see in Section 6331, that "Liability" for a tax has to be prooven, beyond a reasonable doubt, prior to taxing anyone.
Also, it was related in the "TRANSCRIPT" at the District Court Hearing on Wednesday June 29, 1994, 2PM, that: "Title 26, USC 6331, clearly specifies", "Levy" and "Distraint" and "Liability". The only part of this Section 6331 that pertains to a "Notice" of Levy relates to: "Any Officer, Employee or Elected Official of the United States, the District of Columbia or any Agency or Instrumentality of the United States or the District of Columbia". It does not relate to a private individual. The Pension Fund adhered to a "Notice" of Levy Form and not a "Levy" and Distraint Form, as related in Section 6331 and the following Cases:
Freeman v. Mayer, Cite as 152, F.Supp. 383, 385, 387.

United States v. O'Dell, 6th. Cir. Court of Appeals March 10, 1947, Pg.304, 307, 308.

GREGORY'S RIGHTS PURSUANT TO NOTICE OF LEVY FORM 668-W, WHICH DID NOT CONTAIN AN O.M.B. # (OFFICE OF MANAGEMENT AND BUDGET) AND PART 3 OF 668-W FORM, BASED ON "UNDER PENALTIES OF PERJURY", ARE IN CONFLICT.
As you can clearly see, this Form 668-W, "Notice" of Levy does not legally contain an O.M.B. #. The Paperwork Reduction Act of 1980, P.L.96-511, 94 Stat. 2813, 44 USC 3512 of the Paperwork Reductrion Act Law is further proof of O.M.B. #'s on Legal Forms.
Also, on this Form 668-W, Part 3, I cannot find a Law, Number of Law or Section of Law that forces an individual to sign a Document, "Under Penalties of Perjury", thereby, giving up Jurisdictional Rights in a Court of Law.
I also, refuse to waive my 5th. Amendment Rights according to the U.S. Constitution. See:
Miranda v. Arizona, 384, U.S., 436, 86 S. Ct. 1602 (1966), Pgs. 442, 444, 445, 459, 460, 461, 462, 469, 474, 475, 479, 480, 481, 485, 486, 491, 492.

Garner v. United States, 424 U.S. 648 (1975) Pg. 652, 653, 656.

GREGORY'S RIGHTS PURSUANT TO TITLE 26 USC SECTION 6332(e) ARE IN CONFLICT.
As we can clearly see this section specifically relates: "Effect of honoring "Levy". It does not even mention "Notice" of Levy in the Statute. The Pension Fund may be Immune from Suit based on compliance with a "Levy", but the Pension Fund is not Immune from Suit based on compliance with a "Notice" of Levy, stipulated to throughout the Judgment. The "Notice" of Levy which was stipulated to in Defendant's Brief at the Court of Appeals Level was processed in violation of this Statute. In the Defendant's Brief they Stipulate and then Manipulate "Notice" of Levy v. Levy. These related Statutes should be read verbatim and followed according to Law. "In the interpretation of Statutes Levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out.

In case of doubt they are constured most strongly against the government and in favor of the citizen". See:

Gould v. Gould, 245 U.S. 151, 153 (1917 38 S.Ct. 53; 62 L.Ed. 211).

United States v. Merriam, 263 U.S. P.179 188 (1923).

Busse v. C.I.R. 479 F.2d 1147, P.1151, (1973).

United States v. Missouri P.R.Co., 278 US 269, 277, 49 S.Ct. 133, 136, 73, L.Ed. 322.

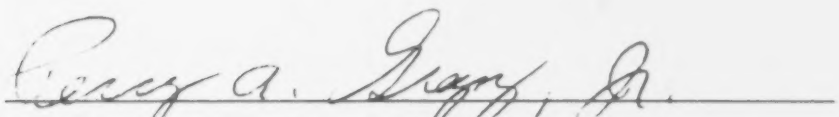
Spreckles Sugar Refining Company v. McClain, 192 U.S. P.416, (1904).

CONCLUSION

The important issues presented here which the Sixth Circuit decided in Conflict is whether Title 26, U.S.C. Code Law, Constitutionsl Provisions and Other Authorities have been violated according to Law.

Wherefore Petitioner requests that this Court grant his Petition for a Writ of Certiorari to review and reverse the decision of the Sixth Circuit.

Respectfully submitted,



PERCY A. GREGORY, JR.
PRO-SE
603 Kinglet
Roch. Hls., Mich. 48309
810-853-4007

APPENDIX

APPENDIX A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MICHIGAN

CIVIL ACTION NO. 93-74453

PERCY A. GREGORY, JR.

Plaintiff

v.

WILLIAM DELLAPA FOR ELECTRICAL WORKERS PENSION FUND OF LOCAL UNION 58, I.B.E.W. DETROIT, MICHIGAN

Defendants

MEMORANDUM AND ORDER

COHN, JUDGE

I.

This is a tax case. Plaintiff Percy A. Gregory, Jr. (Gregory) seeks to recover from defendant, Electrical Workers Pension Fund of Local Union 58, I.B.E.W., Detroit, Michigan (Pension Fund),[1] monies he contends the Pension Fund and Electrical Worker's Annuity Fund (collectively "the Funds") unlawfully withheld and paid to Internal Revenue Service (IRS).

Now before the Court are cross motions for summary judgment. For the reasons which follow, Gregory's motion will be denied, the Pension Fund's motion will be granted, and the Annuity Fund's motion will be granted. The case will be dismissed.

[1] The caption on Gregory's complaint names the defendant as "Mr. William Dellapa for Electrical Workers Pension Fund of Local Union 58, I.B.E.W., Detroit, Michigan 48226." William Dellapa is the administrator for the IBEW, Local Union No. 58 Annuity Fund (Annuity Fund) and the Electrical Workers Pension Fund of Local Union No. 58. Gregory's complaint concerns both the Annuity Fund and the Pension Fund. The relationship between the two Funds is unclear, therefore the Court treats them as two separate defendants.

II.

Gregory is a participant in the Pension Fund and the Annuity Fund. On January 13, 1993 he filed an application for Pension Fund Benefits. On March 3, 1993 Gregory filed an IRS Withholding Certificate, Form W4-P, indicating that he "elected[ed] not to have income tax withheld from my pension or annuity". The IRS served a Notice of Levy on the Pension Fund on April 6, 1993 attaching "the taxpayer's pending claim for total and permanent disability retirement benefits."

On July 21, 1993 Gregory's application for disability retirement benefits was approved by the Pension Fund retroactively effective February 1, 1993. His lump sum retroactive benefit payment totalled $8,015.84 for the period February through August 1993. The Pension Fund sent Gregory Parts 2, 3, 4, and 5 of the IRS Notice of Levy and asked him to complete Parts 3 and 4 and return them to the Pension Fund. The Pension Fund instructed Gregory that is he did not complete Parts 3 and $, the exempt amount to which he was entitled would be calculated as if he were married and filing separately and having only one exemption. Gregory did not complete Part 3 "Statement of Exemptions and Filing Status" of the Notice of Levy. The Pension Fund deducted $4,836.65 under the formula provided in the Notice of Levy and paid it to the IRS pursuant to the Notice of Levy.[2] The balance, $3,179.19 was paid to Gregory on August 2, 1993.

On July 28, 1993 Gregory sent a letter to Ann Neyden, counsel for the Pension Fund demanding that the Fund not deviate from his specific instructions and enclosing a

1993 Form W-4P Withholding Certificate for Pension and Annuity Payments in which he checked off that he elected not to have taxes withheld from his benefit payment, and an affidavit.

to establish his not subject to tax status with respect to Federal Income Taxes pursuant to 26 U.S.C. 3402(n) certifying that:

1. I incurred no "liability" for income tax imposed under Title A for the preceding taxable year;

2. I anticipate I will incur no "liability" for income tax imposed under subtitle A for the current taxable year;

3. I had a right to a full refund of any and all amounts withheld for both years.

On August 6, 1993 Gregory sent Dellapa a letter enclosing another 1993 Form W-4P and another affidavit based on 26 U.S.C. 3402 (n).[3]

On August 9, 1993 the Annuity Fund received Gregory's application for annuity benefits in which he elected to have his benefits paid a a lump sum cash payment. The Annuity Fund provided Gregory with a notice "Important Tax Notice Regarding IBEW Local Union No. 58 Annuity Fund Plan Payments", which explained his option to have his lump sum cash payment directly

rolled over into an Individual Retirement Act (IRA), Individual Retirement Annuity or another qualified employee plan, or to have his benefit paid directly to him which would subject him to a twenty percent federal income tax withholding. Gregory did not complete the Direct Rollover Election Form so, Pursuant 26 U.S.C. 3405(c), the Annuity Fund paid Gregory $4,816.17 representing eighty percent of his total benefit of $6,020.21 and paid twenty percent $1,204.04 to the IRS.

[2] The Instructions for Figuring the Amount Exempt from the Levy, which appear on the reverse side of the Notice of Levy, Form 668-W, provide in relevent part:

If you do not receive the completed parts 3 and 4 then the exempt amount is what would be exempt if the taxpayer had returned the form indicating married, filing separate and only the taxpayer is claimed as a personal exemption.....

[3] 26 U.S.C. 3402)n) provides:

Nothwithstanding any other provision of this section, an employer shall not be

required to deduct and withhold tax under this chapter upon a payment of wages to an employee if there is in effect with respect to such payment a withholding exemption certificate.... furnished to the employer by the employee certifying that the employee --

(1) incurred no liability for income tax imposed under subtitle A for his previous taxable year, and

(2) anticipates that he will incur no liability for income tax imposed under subtitle A for his current taxable year.

III.

The Pension Fund moves for summary judgment on several grounds, (1) that Gregory's claim is precluded by a prior adjudication against him on the same issues and claim, (2) Gregory's claim regarding liability for income tax must be brought against the IRS, not against the Pension Fund, (3) that the levy procedure under 26 U.S.C. 6331 is legally sufficient, and (4) that the Pension Fund is immune from suit arising from compliance with and IRS levy under 26 U.S.C. 6332(e). The Annuity Fund moves for summary judgment on the ground that the withholding provision of 26 U.S.C. 3405(c) applies without regard to 26 U.S.C. 3402(n) and that the Annuity Fund is immune from any claim arising out

of compliance with the withholding provisions of the internal revenue code.

Gregory moves for summary judgment against the Pension Fund on the grounds, essentially, that the notice of levy procedure is illegal because the IRS did not send Gregory a notice of assessment and demand, therefore the Pension Fund's withholding of taxes pursuant to the Notice of Levy was illegal. Additionally, Gregory moves for summary judgment against both the Pension Fund and Annuity Fund asserting that they failed to follow the W4-P form on which he elected not to have taxes withheld from his pension and annuity benefits.

A.

1.

In the prior adjudication, Gregory filed suit in 1990 against the Electrical Workers Vacation Fund and the Electrical Workers Supplemental Unemployment Benefit Fund demanding payment of amounts the Funds paid to the IRS pursuant to a Notice of Levy. Percy A. Gregory, Jr. v Ann E. Neydon, representing Electrical Workers Fringe Benefit Funds, No. 90-CV-70572-DT,(E.D.

Mich. December 11, 1990). Gregory claimed the notice of levy procedure was unconstitutional and resulted in deprivation of property and that the defendanta were not immune from liability even if there was compliance with an IRS Notice of Levy. The Court found the notice of levy procedure constitutional and held that the Funds were immune from liability.

The Pension Fund contends that the issues raised regarding the constitutionality of the levy procedure as well as the issue of immunity are the same as those raised here by Gregory and therefore, he is precluded by res judicata or collateral estoppel from relitigating them here.

2.

Under res judicata, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. Allen v. McCurry, 449 U.S.90, 94 (1980). Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue in a different cause of action between the same parties.

Kremer v. Chemical Construction Corp., 456 U.S.461, 466-467 n.6 (1982). In this case, Gregory is not asserting that the levy procedure is unconstitutional, rather he contends that the IRS failed to make an assessment of the amount of taxes he allegedly owes, that he never received a notice of assessment and therefore the notice of levy was merely a request for voluntary payment of taxes. Regardless of the merit of this argument, Gregory is not barred by collateral estoppel or res judicata from asserting it as the argument in the earlier case concerned the constitutionality of the levy procedure, specifically whether the levy procedure constituted a taking under the Fifth Amendment.

With regard to the issue of immunity, the district court in the earlier case was faced with the same issue as presented here, whether defendants are immune from liability arising from compliance with Notice of Levy. However, the Pension Fund is a different but related entity to the defendant in the earlier case, the Electrical Worker's Fringe Benefits Fund (Fringe Benefit's Fund). Under Michigan law, mutuality is an element of collateral estoppel.

Lichon v American Insurance Co., 435 Mich. 408, 428 (1990). Since the Pension Fund and the Annuity Fund are different than the defendant in the earlier action, the Fringe Benefit's Fund, Gregory is not estopped from relitigating the immunity issue.

B.

The Internal Revenue Code clearly provides that persons complying with an IRS Notice of Levy are not subject to liability for complying with the levy:

> Effect of honoring levy. Any person in possession of (or obligated wiht respect to) property or rights to property subject to levy upon which a levy has been made who upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

26 U.S.C. §6332(e). Here the Pension Fund was obligated to pay Gregory certain pension benefits, receivced a notice and demand in the form of a Notice of Levy, and complied with its requirements. Accordingly, it is immue from suit under 26 U.S.C. §6332(e).

C.

Gregory next contends that Auunity Fund illegally withheld funds from his benefits in violation of his specific instructions in his form W-4P in which he elected not to have taxes withheld from his annuity benefits. However, form W-4P is not relevant here. The pertinent provision of 26 U.S.C. §3405 provides:

(a)(1) The payor of any periodic payment (as defined in subsection (e)(2)[4] shall withhold from such payment the amount which would be required to be withheld from such payment if such payment were a payment of wages by an employer to an employee for the appropriate payroll period.

(a)(2) An individual may elect to have paragraph (1) not apply with respect to periodic payments made to such individual.

(c)(1) in the case of any designated distribution which is an eligible rollover distribution --

(A) subsections (a)and (b) shall not apply, and

(B) The payor of such distribution shall withhold from such distribution an amount equal to 20 percent of such distribution.

There is no dispute that the Annuity Fund's lump sum cash payment to Gregory was as eligible rollover distribution. Although Gregory claims that the Annuity Fund was bound by his election on the form W-4P, 26 U.S.C. §3405(C)(1)(A) clearly provides that he cannot make such an election. The Annuity Fund complied with the requirements of the statute by withholding twenty percent of his distribution.

Further, the Annuity Fund is immune from liability, pursuant to 26 U.S.C. §3405 (f) withholding from pensions and annuities are to be treated a wage withholdings under §3402 for other purposes. Under §3403, employers are "liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment." Since the Annuity Fund withheld taxes in compliance with §3405 it is immune from liability for so doing.

[4] 26 U.S.C. §3405(e)(2) defines a periodic payment as "a designated distribution which is an annuity or similar periodic payment."

D.

Finally, in as much as Gregory's claim rests on 26 U.S.C. §3402(n), his claim is without merit. Section 3402(n) governs the relationship between an employer and the Internal Revenue Service. Pascoe v. IRS, 580 F.Supp. 649, 654 (E.D. Mich.1984), aff'd 755 F.2d 932 (6th Cir. 1985). It does not provide an employee with a cause of action against his employer, no does it provide a participant with an action against his pension fund. Id. Further, pursuant to 26 U.S.C. §7422(F)(1), a suit or proceeding for recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected may be brought only against the United States. Accordingly, Gregory's claim concerning the legality of the levy process or compliance with the levy process must be brought against the IRS.

IV.

For the reasons stated above Gregory's motion for summary judgment is DENIED. The Pension Fund's motion for summary judgment

is GRANTED. The Annuity Fund's motion for summary judgment is GRANTED. The case is DISMISSED.

SO ORDERED.

AVERN COHN

UNITED STATES DISTRICT JUDGE

DATED: JUNE 30, 1994

Detroit, Michigan

APPENDIX B-1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal No. 94-1858
(D.C. No. 93-74453, Dist. of Mich.)

PERCY A. GREGORY

Plaintiff-Appellant,

v.

ELECTRICAL WORKERS LOCAL 58 PENSION TRUST FUND; LOCAL 58, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Defendants-Appellees.

ORDER

BEFORE: MERRITT, Chief Judge; KEITH AND WELLFORD, Circuit Judges.

Percy A. Gregory appeals a district court order dismissing his claims against the defendants, alleging that they improperly withheld taxes from certain funds owed Gregory.

The case has been referred to a panel of the court pursuant to Rule 9(a) Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1993, Gregory sued the Electrical Workers Pension Fund of Local Union No. 58 and the Union, alleging that the defendants improperly withheld and paid to the Internal Revenue Service (IRS) monies owed him from his pension fund and annuity fund. The district court concluded that Gregory's claims were without merit and granted summary judgment for the defendants. Gregory has filed a timely appeal.

Upon review we conclude that the district court properly granted summary judgment for the defendants as there is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law. Moore v. Philip Morris Cos., 8 F.3d 335, 339 (6th Cir. 1993). The district court properly concluded that the defendants were immune from suit for their actions in this case.

See United States v. National Bank of Commerce, 472 U.S. 713, 720-21 (1985); State Bank of Fraser v. United States, 861 F.2d 954, 958 (6th Cir. 1988); Bright v. Bechtel Petroleum, In., F.2d 766, 770 (9th Cir. 1986; Edgar v. Inland Steel Co., 744 F.2d 1276, 1278 (7th Cir. 1984)(per curiam). Further, as Gregory is challenging federal income tax withholding, his exclusive remedy for a tax refund is an action against the United States. See 26 U.S.C. § 7422; Burda v. M. Ecker Co., 954 F.2d 434, 439 (7th Cir. 1992).

Accordingly, we affirm the judgment for the reasons set forth in the district court's order filed on June 30, 1994. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____
Clerk

Entered for the Court:
Leonard Green,
Clerk,
Filed April 20, 1995.

APPENDIX C-1

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Appeal No. 94-1858

PERCY A. GREGORY,
Plaintiff-Appellant,

v.

ELECTRICAL WORKERS LOCAL 58
PENSION TRUST FUND, ET AL.,
Defendants-Appellees

ORDER
Entered June 14, 1995

Before: MERRITT, CHIEF JUDGE; KEITH AND WELLFORD, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all active judges of this court having requested a vote on the suggestion for rehearing en banc, the

petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

Supreme Court, U.S.
FILED
SEP 22 1995
OFFICE OF THE CLERK

(2)

No. 95-293

In The
Supreme Court of the United States

October Term, 1995

PERCY A. GREGORY, JR.,
Petitioner,

v.

ELECTRICAL WORKERS LOCAL 58
PENSION TRUST FUND, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

AND APPENDIX

SACHS, WALDMAN, O'HARE,
HELVESTON, HODGES & BARNES, P.C.
By: ANN E. NEYDON (P24670)
Counsel of Record
Attorneys for Respondents
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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I.

WAS THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S GRANT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENIAL OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT CONSISTENT WITH THE DECISIONS OF THIS COURT AND ALL OTHER COURTS OF APPEALS?

Respondents Answer "Yes".

PARTIES TO THE PROCEEDING

The parties to this proceeding are Percy A. Gregory, Jr., Petitioner and plaintiff-appellant below, appearing pro-se, and the Electrical Workers Pension Trust Fund of Local No. 58, I.B.E.W. and the IBEW Local No. 58 Annuity Fund, Respondents and defendants-appellees below, which are represented by Sachs, Waldman, O'Hare, Helveston, Hodges & Barnes, P.C., by Ann E. Neydon (Counsel of Record).

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No. 95-293

In The

Supreme Court of the United States

October Term, 1995

PERCY A. GREGORY, JR.,

Petitioner,

v.

ELECTRICAL WORKERS LOCAL 58 PENSION TRUST FUND, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

CITATIONS OF OPINIONS BELOW

The Orders and Opinions delivered in the courts below are reproduced in the Appendix to Petitioner's Petition for Writ of Certiorari and are as follows:

1. Memorandum and Order in *Percy A. Gregory, Jr.* v *William Dellapa for Electrical Workers Pension Fund of Local 58, I.B.E.W., Detroit, Michigan*, No. 93-74453 (E.D. Mich., S.D. June 30, 1994).

2. Order in *Percy A. Gregory* v *Electrical Workers Local 58 Pension Trust Fund; Local 58, International Brotherhood of Electrical Workers*, No. 94-1858 (6th Cir. April 20, 1995).

3. Order in *Percy A. Gregory* v *Electrical Workers Local 58 Pension Trust Fund, et al.*, No. 94-1850 (6th Cir. June 14, 1995).

STATUTES INVOLVED

Respondents call to the Court's attention the following statutory provisions upon which the Respondents relied in defending this action. They are reproduced in their entirety in the Appendix to this Brief.

26 USC § 401(a)(31)
26 USC § 402(c)(4)
26 USC § 402(f)
26 USC § 3402(n)
26 USC § 3403
26 USC § 3405(a)
26 USC § 3405(c)
26 USC § 3405(f)
26 USC § 6332(e)
26 USC § 7422(f)(1)
44 USC § 3512

STATEMENT OF THE CASE

A. The Pension Fund Is Served With An IRS Notice Of Levy On Benefits Payable To The Petitioner And Complies Therewith.

Petitioner Percy A. Gregory, Jr., is a participant in the Electrical Workers Pension Trust Fund of Local No. 58, I.B.E.W. (hereinafter Pension Fund), a defined benefit pension plan.

On April 6, 1993, the Internal Revenue Service (hereinafter IRS) served the Pension Fund's attorneys and designated agent for service of legal process with a Notice of Levy on Pension Fund benefits payable to the Petitioner. The Levy attached to benefits payable pursuant to Petitioner's then-pending application for disability retirement benefits. On July 21, 1993, the Pension Fund's Trustees approved that application, retroactive to February 1, 1993.

Part 3 of the Notice of Levy, the Statement of Exemptions and Filing Status, was then sent to the Petitioner by the Pension Fund's attorney. Petitioner refused to complete that Part 3, so the Pension Fund, in accordance with IRS instructions, calculated the portion of Petitioner's first benefit payment (which included retroactive benefit payments for the months February through August, 1993) that was exempt from levy as if Petitioner were a married individual, filing separately and having only the personal exemption.

The Pension Fund paid $4,836.55 of Petitioner's initial benefit payment of $8,015.84 to the IRS and paid the balance, $3,179.19, to Petitioner.

B. The Annuity Fund Withholds Twenty Percent Of Petitioner's Lump Sum Benefit.

Petitioner was a participant in the I.B.E.W. Local No. 58 Annuity Fund (hereinafter Annuity Fund), a defined contribution pension plan. On August 9, 1993, he filed an application for benefits with the Annuity Fund and elected to have the benefits paid in a Lump Sum.

Pursuant to Internal Revenue Code (hereinafter Code) Sections 401(a)(31) and 402(f), and the regulations thereunder, the Annuity Fund provided Petitioner with an explanation of his options to (1) "roll over" his entire lump sum payment into an individual retirement account or annuity or into another qualified plan which accepts rollovers, or (2) have 80% of his benefit paid directly to him and 20% paid to the Internal Revenue Service as income tax withholding. Petitioner did not elect to have his benefit paid as a direct rollover, so, on September 1, 1993, pursuant to and in compliance with Internal Revenue Code § 3405(c), the Annuity Fund paid $4,816.17, which was 80% of Gregory's total benefit of $6,020.21, to Gregory and $1,204.04, which was 20% of Gregory's total benefit, to IRS as federal income tax withholding.

C. Petitioner Files Suit Against The Pension Fund And The Annuity Fund.

Petitioner filed a Complaint in Oakland County (Michigan) Circuit Court on October 1, 1993, which consisted of a recital of events and a demand for relief, but no specific allegations. He demanded $6,040.69[1] plus interest and costs, punitive damages of $100,000 "Tax Free" and "a Permanent Injunction against further interference with the plaintiff's arguments and contentions with the IRS from plaintiff's [*sic*] Pension Trust Fund and Annuity Fund."

On October 21, 1993, the Pension Fund and the Annuity Fund removed the action to the United States District Court, Eastern District of Michigan, Southern Division because Petitioner's claims arose under 29 USC § 1132(a)(1)(B).

On October 27, 1993, Respondents filed their Answer to Complaint. On November 15, 1993, Petitioner filed "Plaintiff's Counter Claim to Defendants' Answer to Complaint", in which he set forth the bases of his claims against Respondents, that (1) he is not liable for income tax, (2) the IRS levy procedure is legally deficient and (3) the Pension Fund is not immune from suit.

On December 22, 1993, Respondents filed their Motion for Summary Judgment, and on January 4, 1994, Petitioner filed his Motion for Summary Judgment.

Oral argument was heard by the District Court on June 29, 1994. The District Court granted Respondents' Motion for Summary Judgment and denied Petitioner's Motion for Summary Judgment in its Judgment and Memorandum and Order entered June 30, 1994. The District Court held that:

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[1] **The $6,040.69 demanded in the Complaint represents the $4,836.65 attached from Petitioner's Pension Fund benefit by the IRS Notice of Levy and the $1,204.04 paid from his Annuity Fund benefit for federal income tax withholding.**

- The Pension Fund is immune from suit under 26 USC § 6332(e) for its compliance with an IRS Notice of Levy,
- The Annuity Fund is immune from suit under 26 USC § 3403 for its compliance with the withholding provisions of 26 USC § 3405,
- Petitioner failed to state any claim for which relief may be granted under 26 USC § 3402(n), and
- Petitioner's suit for recovery of any federal income taxes alleged to have been erroneously or illegally assessed or collected may be brought only against the United States, pursuant to 26 USC § 7422(f)(1).[2]

On July 29, 1994, Petitioner appealed the District Court's Judgment to the Court of Appeals for the Sixth Circuit. The Court of Appeals, without oral argument, affirmed the Judgment of the District Court and held that:

- Summary judgment was properly granted to Respondents by the District Court as there was no genuine issue as to any material fact and Respondents were entitled to judgment as a matter of law,
- The District Court properly concluded that Respondents were immune from suit in this matter, and
- Petitioner's exclusive remedy is an action against the United States.

---

[2] The Court also held Petitioner is not barred by the doctrines of Res Judicata or Collateral Estoppel from relitigating the issues of immunity, and those relating to the legality of the Levy procedure determined by the District Court in Case No. 90-70572 and affirmed on appeal in the Court of Appeals for the Sixth Circuit Court, Case No. 91-1232, which holdings Respondents did not appeal.

On May 4, 1995, Petitioner filed a Petition for Rehearing En Banc with the Court of Appeals for the Sixth Circuit, which petition was denied on June 14, 1995.

On August 24, 1995, Respondents received Petitioner's Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Petitioner seeks relief from respondent Pension Fund based upon its compliance with an IRS levy on his pension benefits and from Respondent Annuity Fund based on its compliance with Internal Revenue Code provisions on mandatory federal tax withholding from lump sum benefits.

The District Court held that both Respondents are immune as a matter of statutory law from suit based on their compliance with the IRS Levy and the Code and that Petitioner's legal remedy is a suit against the United States. The Court of Appeals for the Sixth Circuit affirmed.

The Sixth Circuit's decision was in accord with all decisions of that court, all decisions of other United States courts of appeals and all decisions of this Court which have considered the questions raised by Petitioner.

Thus, Petitioner has failed to establish a basis for review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT'S HOLDING THAT RESPONDENT PENSION FUND IS IMMUNE FROM SUIT FOR ITS COMPLIANCE WITH AN IRS NOTICE OF LEVY IS CONSISTENT WITH EVERY DECISION OF THIS COURT AND ALL LOWER COURTS.

Persons complying with an IRS Notice of Levy under 26 USC § 6331 are immune under 26 USC § 6332(e) from liability for any claim arising out of the levy:

> (e) **Effect of honoring levy.** Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

The validity and applicability of this Section is unquestioned. *State Bank of Fraser* v *U.S.*, 861 F.2d 954 (6th Cir. 1988) at 958, citing *United States* v *National Bank of Commerce*, 472 U.S. 713 (1985); *Burroughs* v *Wallingford*, 780 F.2d 502 (5th Cir. 1986); *Commonwealth of Kentucky* v *Laurel County*, 805 F.2d 628, 635 (6th Cir. 1986), *cert. denied*, 484 U.S. 817, 818 (1987); *In re Sigmund London, Inc.*, 139 B.R. 765 (Bankr., E.D. N.Y. 1992).

The District Court held that the Pension Fund acted properly in complying with the IRS Notice of Levy and, pursuant to 26 USC § 6332(e), is immune from suit.

Petitioner argues that the immunity of 26 USC § 6332(e) is conferred only upon those complying

with a Levy, which he seeks to distinguish from a Notice of Levy. There is no basis in the law for that distinction.

This Court held in *Phelps* v *United States*, 421 U.S. 330 (1975), that service of a Notice of Levy is sufficient to levy on a taxpayer's property:

> Treasury Regulations, 26 CFR 301.6331-1(a)(1) (1974) provide that a "[l]evy may be made by serving a *notice of levy*," and that levy gave the United States the right to the proceeds.

(emphasis added) *Phelps*, 421 U.S. at 335, and held that

> Historically, service of notice has been sufficient to seize a debt, . . . and notice of levy and demand are equivalent to seizure.

(*Phelps*, 421 U.S. at 337).

A taxpayer making the same argument made by Petitioner here was assessed Rule 11 sanctions in *Pawlowske* v *Chrysler Corp.*, 623 F. Supp. 569 (DC Il 1985), *aff'd*, 799 F.2d 753 (7th Cir. 1986), in which the court cited *Phelps* and other cases in pointing out the frivolity of the taxpayer's claim:

> [N]umerous cases make clear that a Notice of Levy is all that is required for the IRS to gain possession of the property . . . See *In re Chicagoland Ideel Cleaners, Inc.*, 495 F.2d 1283, 1285 (7th Cir. 1974), aff'd sub nom. *Phelps* v *United States*, 421 U.S. 330, 335-37, 95 S.Ct. 1728, 1731-32, 44 L.Ed.2d 201 (1975) ("notice of levy and demand are equivalent to seizure"); *United States* v *Pittman*, 449 F.2d 623, 627 (7th Cir. 1971); *Rosenblum* v *United States*, 300 F.2d 843, 844-45 (1st Cir. 1962); *United States* v *Eiland*, 223 F.2d 118, 121 (4th Cir. 1955). The cases plaintiff relies upon to argue that more than a notice of levy is required were decided under a version of the statute that was replaced in 1954 with significantly different lan-

> guage, and the cases just cited make clear that plaintiff's cases are no longer good law. See 495 F.2d at 1285; 449 F.2d at 627 and n. 3; and 300 F.2d at 845.

Pawlowske, 623 F. Supp. at 570-571.

Thus, Petitioner's attempt to defeat the immunity conferred on the Pension Fund by 26 USC § 6332(e) must fail, as its basis has been repeatedly and universally rejected by the courts.

Petitioner attacks the validity of the Notice of Levy, claiming (1) that "liability" for tax is somehow lacking; (2) that 26 USC § 6331 applies only to certain federal employees; (3) that service of a Notice of Levy is insufficient to levy on property; and (4) that the Notice of Levy lacked numerical designation from the Office of Management and Budget, a point raised improperly for the first time on appeal. *Brickner* v *Voinovich*, 977 F.2d 235 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2965 (1993). Each of these attacks is baseless and had been repeatedly and universally rejected.

Petitioner's claim regarding the legal sufficiency of the levy procedure provided for in 26 USC § 6331 is a stale one. *State Bank of Fraser* v *United States*, 861 F.2d 954, 957-958 (6th Cir. 1988), citing *United States* v *National Bank of Commerce*, 472 U.S. 713 (1985); *Christensen* v *U.S.*, 733 F. Supp. 844 (D.N.J. 1990), *aff'd*, 925 F.2d 416 (3rd Cir. 1991). In *United States* v *Pilla*, 550 F.2d 1085, 1092 (8th Cir. 1977), the Court stated:

> The defendant's argument boils down to the proposition that 26 USC § 6331 is unconstitutional because it permits a seizure of property without prior judicial proceedings. That argument has been out of date since the Supreme Court decided *Phillips* v *Commissioner of Internal Revenue*, 283 U.S. 589, 51 S. Ct. 608, 75 L. Ed. 1289 (1931), more than forty-five years ago. See *Fuentes* v *Shevin*, 407 U.S. 67, 90-92, 92 S. Ct. 1983, 32 L. Ed.

> 2d 556 (1972); *Kalb* v *United States*, 505 F.2d 506, 510 (2d Cir. 1974); and *Tavares* v *United States*, 491 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 925, 95 S. Ct. 1120, 43 L. Ed. 2d 394 (1975).

See also *Baddour, Inc.* v *United States*, 802 F.2d 801, at 807 (5th Cir. 1986); *Ginter* v *Southern*, 611 F.2d 1226, at 1228 (8th Cir. 1979), *cert. denied*, 446 U.S. 967 (1980); *Abel* v *Campbell*, 334 F.2d 339, at 342 (5th Cir. 1964), addressing the constitutionality of the levy procedure against a variety of challenges.

Petitioner's argument that 26 USC § 6331 only applies to certain federal employees is also stale. This Court rejected that argument in 1959 in *Sims* v *United States*, 359 U.S. 108 (1959), in which a taxpayer argued that the specific reference in § 6331(a) to a Notice of Levy on federal employees evidenced an intent to *exclude* other persons from the § 6331 Notice of Levy procedure. The Court held that that specific reference in § 6331 was intended to make the levy procedure, *already* applicable to non-federal employees, applicable to federal employees:

> "It is evident that § 6331 was enacted . . . to subject the salaries of federal employees to the *same collection procedures as are available against all other taxpayers* . . ."

(emphasis added) *Sims*, 359 U.S. at 113.

The *Pawlowske* decision cited above, in which Rule 11 sanctions were assessed against a taxpayer raising precisely the claims Petitioner raises here, relied on *Sims:*

> Plaintiff also argues that because § 6331 specifically states a notice of levy is sufficient to "make" a levy on the salary of a federal or District of Columbia employee, serving a notice levy is *not* sufficient to "make" a levy on the salary of a private sector employee. That same argument was clearly rejected in *Sims* v *United States*,

Pawlowske, 623 F. Supp. at 571.

Petitioner's attempt to distinguish a Levy from a Notice of Levy has no more validity as an attack on the Notice of Levy itself than it does as an attack on the immunity conferred by 26 USC 6332(e).

Petitioner raised for the first time on appeal the argument that lack of an O.M.B. number invalidates the Notice of Levy. This same argument was rejected in *Lonsdale* v *U.S.*, 919 F.2d 1440, 1444 (10th Cir. 1990), which held that IRS levies without an O.M.B. number do not violate 44 USC § 3512 because that chapter does not apply to collection of information during the conduct of an administrative action or investigation involving an agency against specific individuals or entities. Also see *U.S.* v *Collins*, 920 F.2d 619, 630, fn 12 (10th Cir. 1990), *cert denied*, 500 U.S. 920 (1991), affirming the continued validity of *Lonsdale* in light of *Dole* v *United Steelworkers of America*, 494 U.S. 26, 33 (1990).

Finally, Petitioner confuses his arguments regarding the withholding provisions of the Code with its levy provisions. Petitioner's failure to complete Parts 3 and 4 of the IRS Notice of Levy required the Pension Fund to calculate the amount exempt from levy as if he were married and filing separately with only the personal exemption. His "elect(ion) not to have income tax withheld from (his) Pension and Annuity" is irrelevant for this purpose.

Each and every one of Petitioner's claims can be brought only against IRS, as the District Court held and the Court of Appeals for the Sixth Circuit affirmed.

❧ ❧ ❧

II.

THE DISTRICT COURT'S HOLDING THAT RESPONDENT ANNUITY FUND IS IMMUNE FROM SUIT FOR ITS COMPLIANCE WITH THE WITHHOLDING PROVISIONS OF THE INTERNAL REVENUE CODE IS CONSISTENT WITH EVERY DECISION OF THIS COURT AND ALL LOWER COURTS.

Section 3405(f) of Title 26 provides that for other purposes (i.e., those not expressly addressed in subsection (a) through (e) of that Section), distributions from pension plans are to be treated as wages with respect to the withholding provisions of Chapter 24 of Title 26, Collection of Income Tax at Source on Wages. Accordingly, 26 USC § 3403, Liability for Tax, applies to respondent Annuity Fund:

> § 3403. **Liability for tax.**
>
> The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

In *Edgar* v *Inland Steel Co.*, 744 F.2d 1276, 1278 (7th Cir. 1984), the Court held, pursuant to 26 USC § 3403, that employees have no cause of action against employers to recover wages withheld and paid over to the government in satisfaction of federal income tax liability. This view has prevailed in all courts which have considered the issue. *Beerbower* v *U.S.*, 592 F. Supp. 67, 68 (E.D. Mich S.D. 1984), *aff'd*, 787 F.2d 588 (6th Cir. 1986); *Pascoe* v *IRS*, 580 F. Supp. 649, 654 (E.D. Mich S.D. 1984), *aff'd*, 755 F.2d 932 (6th Cir. 1985); *Press* v *McNeal*, 568 F. Supp. 256, 259 (E.D. Pa 1983); *Chandler* v *Perini*, 520 F. Supp. 1152, 1156 (D.N.H. 1981); *Wise* v *Commissioner of IRS*, 624 F. Supp. 1124, 1129 (D. Mont 1986); *Peth* v *Breitzmann*, 611 F. Supp. 50, 54 (D.C. Wis. 1985).

Petitioner's claims against the Annuity Fund arise from its compliance with the withholding provisions of the Code and are, under the authority cited above, barred by the immunity provisions of 26 USC § 3403.

Pages 4 and 5 of the Petition are directed in various ways to this aspect of the District Court's decision. Each point was argued in the lower court, which held that there was no basis for suit against the Annuity Fund. These arguments reflect Petitioner's failure to understand the operation of 26 USC § 3405(c), which provides for a *mandatory* 20% withholding from an eligible rollover distribution which is *not* paid directly into another pension plan or individual retirement account.

The Unemployment Compensation Amendments of 1992, Public Law 102-318, Section 522(b), amended the withholding requirements of 26 USC § 3405 by adding, *inter alia*, the following text:

> **(c) Eligible rollover distributions.**
>
> **(1) In general.** In the case of any designated distribution which is an eligible rollover distribution
>
> (A) subsections (a) and (b) shall not apply, and
>
> (B) the payor of such distribution shall withhold from such distribution an amount equal to 20 percent of such distribution.
>
> **(2) Exception.** Paragraph (1)(B) shall not apply to any distribution if the distributee elects under section 401(a)(31)(A) to have such distribution paid directly to an eligible retirement plan.
>
> **(3) Eligible rollover distribution.** For purposes of this subsection, the term "eligible rollover distribution" has the meaning given such term by section 402(f)(2)(A) (or in the case of an annuity contract under section 403(b), a distribution from such contract described in section 402(f)(2)(A)).

Section 402(f)(2)(A) of Title 26 defines "eligible rollover distribution" as having the same meaning, for these purposes, as 26 USC § 402(c)(4), which states:

> **(4) Eligible rollover distribution.** For purposes of this subsection, the term "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term shall not include
>
> (A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made
>
> (i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or
>
> (ii) for a specified period of 10 years or more, and
>
> (B) any distribution to the extent such distribution is required under section 401(a)(9).

Under the Code's definition, the Annuity Fund's lump sum cash payment to Petitioner of his account balance was an eligible rollover distribution. The Annuity Fund sent Petitioner all of the information which the Code requires to be provided to the recipient of an eligible rollover distribution. Petitioner did not elect to have his eligible rollover distribution, the lump sum cash benefit, rolled over directly into an individual retirement account, individual retirement annuity or another qualified retirement plan, as was his option. Accordingly, the Annuity Fund, as payor of the eligible rollover distribu-

tion, withheld 20% of the lump sum benefit for federal income tax pursuant to 26 USC § 3405(c), *supra*.

Petitioner alleges that the Annuity Fund was bound by the IRS Form W-4P, Withholding Certificate for Pension or Annuity Payment, which he filed with the Fund in October, 1993, electing not to have federal income taxes withheld from his benefit payment. Section 3405(c)(1)(A) of Title 26, however, specifically provides that "subsections (a) and (b) shall not apply" in the case of an eligible rollover distribution such as the lump sum cash payment which Petitioner applied for and received from the Annuity Fund. Subsection (a) of 26 USC § 3405 states:

> **(a) Periodic payments.**
>
> (1) **Withholding as if payment were wages.** The payor of any periodic payment (as defined in subsection (e)(2)) shall withhold from such payment the amount which would be required to be withheld from such payment if such payment were a payment of wages by an employer to an employee for the appropriate payroll period.
>
> (2) **Election of no withholding.** An individual may elect to have paragraph (1) not apply with respect to periodic payments made to such individual. Such an election shall remain in effect until revoked by such individual.
>
> (3) **When election takes effect.** Any election under this subsection (and any revocation of such an election) shall take effect as provided by subsection (f)(3) of section 3402 for withholding exemption certificates.
>
> (4) **Amount withheld where no withholding exemption certificate in effect.**

> In the case of any payment with respect to which a withholding exemption certificate is not in effect, the amount withheld under paragraph (1) shall be determined by treating the payee as a married individual claiming 3 withholding exemptions.

Under 26 USC § 3405(c), 20% of any benefit payment which is an eligible rollover distribution but which the recipient chooses not to roll over directly is to be withheld for federal income tax *without* regard to any withholding exemption certificate filed by the recipient.

The District Court correctly held (and the Court of Appeals for the Sixth Circuit affirmed) that in light of 26 USC § 3405(c)(1)(A), Petitioner simply did not have the right to make an election such as that in his "Affidavit Letter", that respondent Annuity Fund properly withheld 20% of his distribution in compliance with this section and that it is immune from liability for so doing.

III.

THE DISTRICT COURT'S HOLDING THAT 26 USC § 3402(n) PROVIDES PETITIONER WITH NO PRIVATE CAUSE OF ACTION AGAINST RESPONDENT ANNUITY FUND IS CONSISTENT WITH EVERY DECISION OF THIS COURT AND ALL LOWER COURTS.

Petitioner challenges the District Court's holding that "in as much as Gregory's claim rests on 26 USC § 3402(n), his claim is without merit".

In *Pascoe* v *IRS*, 580 F. Supp. 649, 654 (E.D. Mich 1984), *aff'd*, 755 F.2d 932 (6th Cir. 1985), the Court held that 26 USC § 3402(n) governs the relationship between the employer and the IRS, and forms no basis for a claim by the taxpayer against his employer.

This portion of the Petition is a repetition of Petitioner's claims based on his "Affidavit Letter", which

were discussed above. The District Court's holding on this point was fully supported by statute and case law and the Court of Appeals properly affirmed.

IV.

THE DISTRICT COURT'S HOLDING THAT A SUIT FOR RECOVERY OF FEDERAL INCOME TAX ALLEGED TO HAVE BEEN WRONGFULLY ASSESSED MAY BE BROUGHT ONLY AGAINST THE UNITED STATES IS CONSISTENT WITH EVERY DECISION OF THIS COURT AND ALL LOWER COURTS.

It is well settled that a taxpayer's proper and exclusive remedy for alleged issuance and service of wrongful tax levy is to file a claim with the Internal Revenue Service for a refund. *Jackman* v *D'Agostino*, 669 F. Supp. 43, 46 (D. Conn. 1987). The rights of a taxpayer whose property has been subject to levy are set forth in the Internal Revenue Code, *In re Sigmund London, Inc.*, 139 B.R. 765 (Bankr., E.D. N.Y., 1992), and a suit or proceeding for recovery of any federal tax alleged to have been assessed or collected erroneously or illegally may be maintained *only* against the United States. 26 USC § 7422(f)(1). In *Burroughs* v *Wallingford*, 780 F.2d 502, 503 (5th Cir. 1986), the Court held that challenges to IRS levies "are properly considered in a suit against the IRS and not against (those who comply with the levies)." In *Burda* v *M. Ecker Co.*, 954 F.2d 434, 439 (7th Cir. 1992), the court affirmed dismissal of a claim based upon a challenge to the income tax withholding regulations by stating that the exclusive remedy provision of 26 USC § 7422 merits the grant of a motion under Fed. R. Civ. P. 12(b)(6) to dismiss for failure to state a claim.

V.

THE DISTRICT COURT'S RESOLUTION OF PETITIONER'S ACTION BY SUMMARY JUDGMENT WAS PROPER AND CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE.

Petitioner improperly argues for the first time in his Petition's "Questions Presented" that he was denied a constitutionally protected right to a jury trial in this matter. This issue is not mentioned or argued elsewhere in the Petition. Petitioner himself filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, which motion was denied. Petitioner's untimely challenge to the legality, propriety or constitutionality of Rule 56 and its application in this matter should be deemed to have been waived by his *own* use of the Rule. This point cannot form the basis for a review of the District Court's decision as affirmed by the Court of Appeals for the Sixth Circuit and Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the arguments advanced above, and the record as a whole, Respondents respectfully request that this Court deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

SACHS, WALDMAN, O'HARE,
HELVESTON, HODGES & BARNES, P.C.

By: /s/ ANN E. NEYDON (P24670)
Counsel of Record

Attorney for Respondents
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

Dated: September 22, 1995

APPENDIX TO BRIEF IN OPPOSITION

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STATUTES INVOLVED

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26 USC § 401(a)(31)

(31) Optional direct transfer of eligible rollover distributions.

(A) In general. A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution

(i) elects to have such distribution paid directly to an eligible retirement plan, and

(ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

(B) Limitation. Subparagraph (A) shall apply only to the extent that the eligible rollover distribution would be includible in gross income if not transferred as provided in subparagraph (A) (determined without regard to sections 402(c) and 403(a)(4)).

(C) Eligible rollover distribution. For purposes of this paragraph, the term "eligible rollover distribution" has the meaning given such term by section 402(f)(2)(A).

(D) Eligible retirement plan. For purposes of this paragraph, the term "eligible retirement plan"

has the meaning given such term by section 402(c)(8)(B), except that a qualified trust shall be considered an eligible retirement plan only if it is a defined contribution plan, the terms of which permit the acceptance of rollover distributions.

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26 USC § 402(c)(4)

(4) Eligible rollover distribution. For purposes of this subsection, the term "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust; except that such term shall not include

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made

(i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or

(ii) for a specified period of 10 years or more, and

(B) any distribution to the extent such distribution is required under section 401(a)(9).

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26 USC § 402(f)

(f) Written Explanation to Recipients of Distributions Eligible for Rollover Treatment.

(1) In general. The plan administrator of any plan shall, within a reasonable period of time before making an eligible rollover distribution from an

eligible retirement plan, provide a written explanation to the recipient

(A) of the provisions under which the recipient may have the distribution directly transferred to another eligible retirement plan,

(B) of the provision which requires the withholding of tax on the distribution if it is not directly transferred to another eligible retirement plan,

(C) of the provisions under which the distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution, and

(D) if applicable, of the provisions of subsections (d) and (e) of this section.

(2) Definitions. For purposes of this subsection.

(A) Eligible rollover distribution. The term "eligible rollover distribution" has the same meaning as when used in subsection (c) of this section or paragraph (4) of section 403(a).

(B) Eligible retirement plan. The term "eligible retirement plan" has the meaning given such term by subsection (c)(8)(B).

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26 USC § 3402(n)

(n) Employees incurring no income tax liability. Notwithstanding any other provision of this section, an employer shall not be required to deduct and withhold any tax under this chapter upon a payment of wages to an employee if there is in effect with respect to such payment a withholding exemption certificate (in such form and containing such other information as the Sec-

tion may prescribe) furnished to the employer by the employee certifying that the employee

(1) incurred no liability for income tax imposed under subtitle A for his preceding taxable year, and

(2) anticipates that he will incur no liability for income tax imposed under subtitle A for his current taxable year.

The Secretary shall by regulations provide for the coordination of the provisions of this subsection with the provisions of subsection (f).

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26 USC § 3403

The employer shall be liable for payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

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26 USC § 3405(a)

(a) Periodic payments.

(1) **Withholding as if payment were wages.** The payor of any periodic payment (as defined in subsection (e)(2)) shall withhold from such payment the amount which would be required to be withheld from such payment if such payment were a payment of wages by an employer to an employee for the appropriate payroll period.

(2) **Election of no withholding.** An individual may elect to have paragraph (1) not apply with respect to periodic payments made to such individual. Such an election shall remain in effect until revoked by such individual.

(3) **When election takes effect.** Any election under this subsection (and any revocation of such an election) shall take effect as provided by subsection (f)(3) of section 3402 for withholding exemption certificates.

(4) **Amount withheld where no withholding exemption certificate in effect.** In the case of any payment with respect to which a withholding exemption certificate is not in effect, the amount withheld under paragraph (1) shall be determined by treating the payee as a married individual claiming 3 withholding exemptions.

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26 USC § 3405(c)

(c) Eligible rollover distributions.

(1) In general. In the case of any designated distribution which is an eligible rollover distribution

(A) subsections (a) and (b) shall not apply, and

(B) the payor of such distribution shall withhold from such distribution an amount equal to 20 percent of such distribution.

(2) Exception. Paragraph (1)(B) shall not apply to any distribution if the distributee elects under section 401(a)(31)(A) to have such distribution paid directly to an eligible retirement plan.

(3) Eligible rollover distribution. For purposes of this subsection, the term "eligible rollover distribution" has the meaning given such term by section 402(f)(2)(A) (or in the case of an annuity contract under section 403(b), a distribution from such contract described in section 402(f)(2)(A)).

26 USC § 3405(f)

(f) Withholding To Be Treated as Wage Withholding Under Section 3402 for Other Purposes. For purposes of this chapter (and so much of subtitle F as relates to this chapter).

(1) any designated distribution (whether or not an election under this section applies to such distribution) shall be treated as if it were wages paid by an employer to an employee with respect to which there has been withholding under section 3402, and

(2) in the case of any designated distribution not subject to withholding under this section by reason of an election under this section, the amount withheld shall be treated as zero.

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26 USC § 6332(e)

(e) **Effect of honoring levy.** Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

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26 USC § 7422(f)(1)

(f) Limitation on right of action for refund.

(1) General rule. A suit or proceeding referred to in subsection (a) may be maintained only

against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of title 28 of the United States Code (relating to aliens' privilege to sue) and notwithstanding the provisions of section 1502 of such title 28 (relating to certain treaty cases).

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44 USC § 3512

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.